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AUTHOR O'Connor, Karen
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ABSTRACT

This study examines how women's groups have made use of litigation strategy to gain favorable policy decisions from the U.S. Supreme Court. The litigation strategies associated with four groups are discussed in the major portion of the report. These groups are: (1) the National Women's Suffrage Association (NWSA), active from 1869 to 1875; (2) the National Consumer's League (NCL), active from 1907 to 1936; (3) and the two contemporary groups which have been the primary authors of litigation since 1966, the National Organization for Women (NOW), and the American Civil Liberties Union Women's Rights Project (WRP). Conclusions indicate that most women's groups begin their activity by pursuing legislation to secure a substantive right for women. However, women's efforts do not end when legislation goes into effect; non-implementation may occur unless the legislation is defended. Further, foundation support appears to be critical in aiding group success; limited funds have caused women's groups to limit activities. A chart outlining cases brought before the supreme court is included in the appendix. (KC)

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The Use of the Courts By Women's Groups to Obtain Rights

Karen O'Connor
Emory University

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The women's movement and women's legal status of today and yesteryear[1] have been explored by historians, political scientists and lawyers. One facet of that story, however, has remained relatively unexamined: the use of a litigational strategy by organized women's groups to achieve their aims. This study attempts to examine how several women's groups, in different eras of the women's movement, made use of a litigation strategy in an effort to gain favorable policy decisions from the United States Supreme Court.

It is the contention of this author that the use of a litigation strategy by women's groups has been critical in shaping the direction of the women's movement. Unfortunately it is an element of the women's movement that has been overlooked by commentators and is frequently given little more than a footnote, even by feminist scholars.[2] While the litigation strategy of groups such as the National Association for the Advancement of Colored People (NAACP) have been the focus of several studies, little interest has been displayed in women's group use of a litigation strategy. This may be due in part to the continued salience of NAACP litigation over several decades, while women's groups that have used a litigation strategy have done so only sporadically and for relatively short duration.

This paper examines the litigation strategies associated with four women's groups: the National Women's Suffrage Association (NWSA); the National Consumer's League (NCL); the National Organization for Women Legal Defense and Education Fund (NOW); and, the American Civil Liberties Union Women's Rights Project (WRP). These groups have been selected in order to highlight the use of the courts by women. Further, the selection of those groups reveals factors contributing to the intermittant nature of feminist litigation. The NWSA and NCL dominated women's group litigation for their respective periods, 1869-1875, and 1907-1936. The two contemporary groups, NOW and the WRP, have been the primary authors of the litigation strategy emerging since 1966. Frequently NOW and the WRP act in concert or with other women's groups in the sponsorship of a case or through the submission of an amicus curiae brief.

Even though activity among women's groups has not been continuous, there has been a degree of overlap among participants that has created a personalistic rather than organizational continuity easily overlooked. Among the instant groups, one recognizes a persisting continuity of actors. For example, the driving force of the NCL for several years was also a Vice-President of the National American Woman Suffrage Association, a group that had been formed by the merger of the NWSA and the American Women Suffrage Association.[3] Interestingly her father was a close friend of Susan B. Anthony, a leader of the NWSA who was a prime designer of the legal strategy pursued by the NWSA for five years. There are similar bridges between the National Consumer's League and the American Civil Liberties Union. Dorothy Kenyon, was an active member of the NCL and while an attorney at the Corporation Counsel's Office of the City of New York submitted an amicus brief advancing the position of the League in the last case they undertook, New York v. Tipaldo.[4] Subsequently, Ms. Kenyon acting as local counsel for the ACLU in Florida, handled the litigation in Hoyt v. Florida[5] an unsuccessful challenge to the State's jury exemption statute for women and in 1964 she submitted an amicus brief for the ACLU in Phillips v. Marietta,[6] a land mark case that held that the Civil Rights Act of 1964 prohibited employment discrimination against married females with children.

Several social scientists have examined the concept of a litigation strategy but for the most part their studies have focused either on one group or a particular issue concentration of a group. Clement Vose in particular, is well known for his studies of the NAACP and its use of a litigation strategy in contesting restrictive racial covenants that for years operated to exclude Blacks from many residential areas. In Caucasians Only he described and analyzed the NAACP and the strategy it pursued in order to gradually win "judicial rejection" of restrictive covenants. Vose portrayed a calculated program of litigation designed to garner favorable public and judicial opinion. The NAACP eventually attained its goal when the Supreme Court held in Shelley v. Kramer that such covenants could not constitutionally be enforced by states. Richard Kluger also studied the NAACP's use of a litigation strategy but unlike Vose, focused upon the group's activity in the school desegregation struggle. Through interviews with hundreds of individuals and with painstaking attention to detail, he described the struggle encountered by Black parents in seeking to obtain quality, integrated education for their children and the methods the NAACP employed in utilizing the courts to achieve that goal. Kluger notes in detail the NAACP's problems in securing "willing plaintiffs" to challenge discriminatory practices (a problem that modern day women's groups have also experienced), the legal strategies involved, and the philosophical and practical dilemmas faced by the group in selecting "good" test cases. In the end, by initially attacking racially segregated law schools and than colleges, seemingly the most "vulnerable" educational institutions, the NAACP "primed" the Supreme Court. The effort was a painstaking construction of favorable precedent that could be relied upon later when attacking discrimination in the primary target: elementary schools. In both housing and education, where a litigation strategy was used, victory came only after long years of shaping and litigating issues in the courts.

Establishing favorable legal precedent consumes substantial time and money but is essential for those Cortner labels "constitutional litigants". According to Cortner, constitutional litigants are:

> ...highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals they are almost compelled to resort to litigation9

Blacks and women for the most part fall within the parameters of this definition. But organized women's groups have been plagued with problems that Black interest groups like the NAACP have not faced: until recently women's groups frequently have suffered because there were few women attorneys to present their cases or design plans for litigation.10 Further, women's groups have not displayed the longevity and resulting continuity that the NAACP has enjoyed. Longevity is curcial especially when precedent must be established and women's

groups have faltered from their lack of continuity. The current series of negative rulings from the Supreme Court could be attributable partially to the fact that cases were "rushed" before the Court. The groups did not have, or did not take, the time necessary to build up favorable precedent. Women, as did Blacks, for the most part seek expansion . . . . . doctrines to obtain a basis for favorable policy decisions. But frequently, their participation in cases involving women has been limited to the roles of filing as amicus curiae because of insufficient funds and other reasons. Too often, this has meant individual plaintiffs have brought and shaped issues in the courts by chance rather than women's groups shaping issues by means of a carefully conceived litigation plan.[11] This has frequently harmed what litigation strategy there has existed.

Participation as amicus, as well as group sponsorship of a case, is considered as evidence of group activity for purpose of this analysis, when it appears from the brief itself or from conversations with the lawyers involved, that entrance into the case was determined in accordance with group goals. For example, in two Supreme Court cases decided during the past year, certain women's rights organizations filed amicus briefs in order to inform the Court of their position even though the group had not been involved directly in the case. In a case involving the denial of pregnancy disability payments to women workers,[12] the Women's Law Project (WLP) and the ACLU joined forces to submit an amicus brief which Ruth Bader Ginsberg characterized as the "ERA brief."[13] The Woman's Law Project, by their own description is

> dedicated to working for the equality of women through litigation....The Project is particularly concerned with the theory and implementation of the equal rights amendment, and is currently preparing a major report on state law conformance to the amendment's principles.[14]

They are committed to insuring that courts apply correct legislative history when construing cases in which the ERA might be in issue. As a result, their participation as an amicus in Gilbert, was supported by their statement that

> ...amicus draws upon its expertise in the theory of the equal rights amendment and in the policies at issue here to present to the Court an argument that the legislative history of the ERA supports, rather than negates, the conslusion that Title VII prohibits the exclusion of pregnancy related disabilities from the General Electric disability income protection plan.[15]

The lawyers for the plaintiff in Gilbert, the International Union of Electrical, Radio and Machine Workers, AFL-CIO(IUE)[16] addressed the question of the legislative intent of Congress in its passage of the ERA but the WLP believed that it would best suit its litigation strategy to submit a separate brief more fully addressing the issue.

In another case, several women's rights organizations* jointly

*The groups were the NWP, the Center for Constitutional Rights, NOW, the WLP, the Center for Women Policy Studies, the Women's Legal Defense Fund, and Equal Rights Advocates, Inc.

submitted an amicus brief in support of a plaintiff's contention that the death penalty for rape where no taking of life occurred was unconstitutional.[17] In Coker, plaintiffs had not addressed the legislation's effect on women. Therefore various women's groups believed that it was of the utmost importance to inform the Court of their view that providing the death penalty for the crime of rape ultimately resulted in fewer convictions and that the law

> ...should be rejected as a vestige of an ancient, patriarchal system in which women were viewed both as the property of men and as entitled to crippling "chivalric protection." It is part of the fabric of lawsand enforcement practices which in fact hamper prosecution and convictions for that crime, thus leaving women with little real protection against rape.[18]

The Center for Constitutional Rights (CCR) was the prime mover in the submission and preparation of this brief.[19] When the CCR informed other groups of its intent to submit the brief, those groups listed expressed their desire to associate themselves with the brief. "Joining on" to a brief is a very common practice among women's rights groups but the practice alone does not create a cohesive long range litigation strategy.

The cost of taking a case all the way to the Supreme Court level easily runs into thousands of dollars - money that most women's groups simply do not have. As a result, many groups have opted to enter controversies only when the case has reached the Supreme Court level. They may center either in way of giving aid to the attorney of record or as amicus. The amicus participation has taken two forms; solo or multiple group sponsorship. Coker, for example, illustrates the multiple group sponsorship, whereby women's groups attempt to shape a litigation strategy essentially on the basis of choosing among the cases that are available. Thus, of necessity, much of the litigation policy of these groups follows the incrimartalist model of policy development.

This device permits groups to appraise the Court of their policy stance, demonstrate group solidarity on a particular issue concerning women, and attempt to interject or focus the Court's attention particularly upon those issues they feel to be of prime import to their strategy that were not directly addressed in the briefs of the principle litigators. This is a difficult tactic to utilize successfully and one whose effectiveness turns substantially upon the nature of the cases brought in lower courts and the manner in which the lower court cases have been litigated.

Hakman has criticized the emphasis that political scientists have placed on interest group litigation concluding that the Supreme Court has played a minor role in the attainment of group rights because most cases are not brought by groups.[20] While his criticism may be valid for some groups, the criticism has not always been true of women's groups. Until recently, the majority of cases that have come before the Supreme Court involving women's rights issues have been carefully orchestrated by women's rights groups.

The WRP has attempted to keep abreast of the dockets of all women's groups and participate in most cases involving sex discrimination that reach the Supreme Court by filing amicus briefs. As a result, all but few cases that have been decided by the Supreme Court have had at least some input from women's groups. Either they have been argued by women's groups or the groups have expressed their views by means of amicus briefs. The amicus brief, however, was not a device relied upon by the first women's groups to adopt a litigation strategy and it is questionable whether the device is adequate to generate a truly comprehensive litigation strategy.

I. The National Woman's Suffrage Association

The National Woman's Suffrage Association (NWSA) was founded in May of 1869. In 1869 women activists from throughout the United States gathered in New York City to attend the third anniversary meeting of the Equal Rights Association (ERA). This was a group that had been established after the Civil War to secure greater rights for the newly freed slaves. During the course of the 1869 meeting several women, including Elizabeth Cady Stanton, Susan B. Anthony and Virginia Minor, refused to endorse the ERA's support of the then pending Fifteenth Amendment. The refusal of these women derived from what they perceived as the "under inclusiveness" of the Amendment - women were not enfranchised by its terms. Upset by the ERA's policies and its treatment of several women prominent in the suffrage movement, on May 15, 1869 (the day after the ERA convention), many women that had attended the ERA convention met at the Woman's Bureau in New York City. From that meeting, the NWSA emerged with adherents in attendance from eighteen states. The main purpose of the organization was to be the passage of a Sixteenth Amendment to the Constitution to enfranchise women.

Suffragists were not universal in agreement abut the need for a separate women's suffrage association. Several woman who were in New York to attend the Equal Rights Convention were distressed by the formation of the NWSA and its goals. The more consrvative women, headed by Lucy Stone, soon established a rival orgaization, the American Women's Suffrage Association. Aside from two abortve attempts at reconciliation, the groups were to remain competitors until 1890, after the first phase of the NWSA litigation strategy had been exhausted.

The AWSA was far better organized than was the NWSA. It had an elaborate formal structure which included official state delegations and strong local organizations. The NWSA was more informal and, unlike the AWSA, was open to women of all classes. The variations in structure and composition were, however, incidental to the marked difference in philosophy between the two groups. The NWSA initially had called for a Sixteenth Amendment to the constitution and later was to seek enfranchisement for women through litigation under the Fourteenth Amendment. The AWSA believed that resort to a litigation strategy was foolhardy and a Constitutional amendment impractical. Instead the ASWA clung to the belief that the ballot could only be secured for women by legislation enacted through an incremental, state by state approach.

The focus of the NWSA on the need for a "sixteenth amendment" was short lived. In lieu of an amendment, NWSA chose to look increasingly

toward a litigation strategy and embraced the theory that women in fact were "enfranchised" under the provisions of the recently adopted Fourteenth Amendment. The "roots" of the shift in organizational method occurred in 1869, shortly after the groups formation. While on a trip out West designed to gain new adherents to the cause of suffrage, Susan B. Anthony attended the first convention of the Missouri Woman Suffrage Association. While there, she stayed at the home of Virginia Minor, the President of the Missouri group. Mrs. Minor was a close friend who had attended the founding meeting of the NWSA and initially served on its Advisory Counsel. She later was to hold several different positions in the national organization.

Susan B. Anthony's stay in St. Louis October 6th and 7th, 1869, initiated what the editors of the The History of Woman Suffrage have entitled, "The New Departure.". "The New Departure" was the NWSA switch from a strategy founded upon lobbyingfor a Sixteenth Amendment to one attempting to gain the ballot by court action. The logic of the New Departure was to pursue a series of test cases which put forth the legal argument that women, as citizens, were entitled to vote under the Fourteenth Amendment.

The new legal theory appears to have been initially advanced by Francis Minor, the husband of Virginia, at the meeting Miss Anthony attended in St. Louis. In what were entitled the "St. Louis Resolutions," Mr. Minor set forth the argument that women were citizens, and as such were entitled to vote under the Constitution. (For the full text of the Resolutions, see Appendix A.) The Resolutions were transformed immediately into the foundation of the NWSA'a argument that women were Constitutionally entitled to the franchise. Thousands of copies of the Resolutions were printed and distributed by the organization. Copies of the Resolutions were left on the desks of all members of Congress. The Revolution, a paper edited by Miss Anthony and Mrs. Stanton, published the document in its entirety in two consecutive editions of the paper. The legal argument advanced by Francis Minor shortly thereafter acquired the support of several other influential legal scholars who voiced their agreement with his analysis. In the period which followed, even a few judges proclaimed the soundness of his legal arguments.

Although Francis Minor was the first to publically advocate the use of the Fourteenth Amendment as a means to enfranchise women, he was not the one to effectively disseminate his theory. On December 21, 1870, Victoria Woodhill, a feminist notorious because of her advocacy of free love and spiritualism, went to Washington, D.C. to present Congress with a "Memorial" requesting that the Congress enact appropriate legislation to enable women to vote as was their right under the Fourteenth Amendment.

The positions of Francis Minor and Victoria Woodhull were based on the notion that the Federal Constitution provided the appropriate vehicle for winning suffrage. They did not view state legislatures as proper forums in which to pursue their goals. Francis Minor's characterization of the Resolutions illustrates the position that had emerged:

> These resolutions place the cause of equal rights far in advance of any postion hereintofore taken. Now, for the first time, the views and purposes of our organization (NWSA) assume a fixed and definite end. We no longer beat the air—no longer assume the attitude of petitioners. We claim a right, based upon citizenship.[21]

Francis Minor, clearly an unheralded leader of the direction of the NWSA had now taken, was not content to merely set forth a legal theory. After conversing with Susan B. Anthony, about the necessity of putting the theory of the Resolutions to the test,[22] he publicly requested in a letter to the Revolution dated October 14, 1869:

> ..."if a test case cannot be made at your coming election. If this were done, in no other way could our cause be more widely, and at the same time definitely be brought before the public.[23]

Statements such as Minor's had effect. The authors of The History of Woman Suffrage described some of the consequences in this fashion:

> (women) encouraged by the opinions of able lawyers and judges, ... promptly made a practical test of this question by registering and voting during the state and presidential elections of 1871 and'72. This transferred the discussion, for a time, from the platform and halls of legislation to the courts for final adjudication. [24]

But despite a sound through novel legal theory, there remains some question as to whether the pursuit of this particular legal strategy was made with actual intent and expectation that the women's suffrage cause would prevail in the courts or whether the primary function of the early litigation was a means to mold and secure public opinion. Both Minor and Miss Anthony, in referring to the "New Departure" mentioned it at times in terms of a publicity function.[25] Whatever their primary aims, they did use a litigation strategy and did so in a credible fashion considering the novelty of the legal theory and the NWSA's inability to control litigation at the local level because of its weak state affiliates.

After reviewing the period, Catt and Schuyler[26] list four cases as having had the greatest prominence in the early women's rights struggle:

(1) Bradwell v. Illinois,[27] a claim initiated in 1869 when Mrs. Bradwell's petition for admission to the Illinois bar was rejected;

(2) Sarah Spencer's Case (Spencer v. Board of Inspectors),[28] a case challenging the refusal of the District of Columbia's Election Inspectors to register Mrs. Spencer and seventy other women in April of 1871;

(3) Susan B. Anthony's case (U.S. v. Anthony)[29] a prosecution by the state of New York against

Miss Anthony and 16 others who registered and voted in Rochester, New York on November 5, 1872; and,

(4) Minor v. Happersett,[30] a challenge by Mrs. Minor to the constitutionality of the voting registrar's refusal to accept her name on the roll of voters.

Of the four, the latter three were sponsored by the NWSA. Bradwell v. Illinois, although not concerned with suffrage, was, however, argued under the Fourteenth Amendment as were the NWSA cases. An interesting footnote to the Bradwell case was that the arguments of her counsel, especially those placed before the Supreme Court, strenuously rejected the idea that women were enfranchised under the Fourteenth Amendment! Bradwell's counsel ingenously argued that the right to practice law was distinguished from the right to vote and fell within the parameters of the Privileges and Immunities Clause.' A further point deserving note is that at the time her argument was being made, Mrs. Bradwell was a leader in the AWSA, the women's group that had broken away from the NWSA; the group that was strongly opposed to the idea of using a litigation to obtain the right to vote.

All major Fourteenth Amendment voting cases were sponsored by the NWSA, clearly indicating a litigation strategy and refuting Hakman's belief that interest groups have little control or impact in at the Supreme Court level. Here only two cases reached the Court: both were sponsored by the NWSA. Anthony's case did not reach the Supreme Court owing to an error on the part of her lawyer.[31] Nevertheless, it was the most highly publicized of the three owing to Miss Anthony's notoriety and the outrageous conduct of the judge during her trial.

Little is known today about Sarah Spencer's case. She was a strong supporter of Miss Anthony and a member of the NWSA. In April of 1871, she, Sara Webster and approximately seventy other women attempted to register to vote in the District of Columbia. They were refused. Upon this action of the Board of Inspectors, they immediately brought suit in the Supreme Court of the District of Columbia. The women were represented by two highly regarded lawyers, Albert G. Riddle and Francis Miller.*

Spencer's lawyers premised their argument on the first section of the Fourteenth Amendment. According to them, this section conferred the elective franchise on "all persons." The Supreme Court summarily rejected their argument saying:

> We do not understand that it is even an argument that authority for the exercise of the franchise is to be derived from law.[32]

The decision of the October term of the Supreme Court of the District of Columbia was immediately appealed to the Supreme Court of the United States where it was affirmed although no official report of the Supreme Court action appears to be available in Court records.

*There appears to be some confusion among historians about the identity of the second lawyer. Catt and Schuyler credit Francis Minor, the author of the St. Louis Resolutions with arguing the case, but the bulk of authorities attribute the case to Mr. Riddle.

The attempts of Virginia Minor and Susan B. Anthony to register to vote came after the adverse decision had been rendered in Spencer. According to her memoirs, Susan Anthony was prompted to register to vote after reading an editorial in the local Rochester paper that urged all citizens to register or else loose their opportunity to vote in the upcoming elections. She immediately "set down her paper," and accompanied by her sister, made her way to the polls. There she was joined by fourteen other women in her election ward alone. In all, some fifty women registered in Rochester on that day. Her account for some reason, tends to play down the fact that there was a concerted litigation strategy being acted out. Other statements and actions of hers confirm the concerted nature of the plan so it is unclear why she suggest an alternative explanation on her memoirs. A letter to Elizabeth Cady Stanton on election day, 1872 shows that much planning had gone into the actions of women that day. In it she wrote: "I hope the morning's telegrams will tell of many women all over the country trying to vote." The letter continued, "I'm awfully tired - for five days I've been on the constant run," which according to Mrs. Stanton was due to Susan's extensive effort to mobilize women for the election day effort.[33]

Further and conclusive evidence of the concert of action between Susan Anthony and Virginia Minor derives from an exchange between Miss Anthony and the Election Commissioner.

Question from the election commissioner: "You went into this matter for the purpose of testing the question?"

Susan B. Anthony: "Yes, sir; I had been resolved <u>for three years</u> to vote at the first election when I had been at home for thirty days before."[34]

The time of decision mentioned by Miss Anthony dated back to the conversation she had with Virginia and Francis Minor three years and one month earlier at the Minor's home during the Missouri Suffrage Convention.

Miss Anthony's case, unlike the others, never reached the Supreme Court. The facts also differed in that she initially was allowed to register and vote. The other women were forced to sue various election inspectors or boards of election because they had been refused the opportunity to register. While they were initiating civil suits, Miss Anthony faced <u>criminal</u> charges in federal court for her act of voting. She was convicted after a trial when the presiding Judge <u>directed the jury to find her guilty</u> - a controversial step to say the least. Another unusual facet of this case also involved the Judge: he wrote his decision before the case was presented. According to reports of the day he did not want to be unprepared because this was his first criminal trial!

Unlike Susan Anthony's trial, Mrs. Minor's test case under the Fourteenth Amendment was not fraught with legal irregularities. She, like Miss Anthony, suffered a defeat in the state court but was granted a right of appeal to the U.S. Supreme Court. Mrs. Minor was represented by her husband throughout the course of the litigation. In point of fact her husband was a co-plaintiff with her, because as a married women she had no right to sue in her own name! As with the other attorneys who previously had used the argument he had first postulated, Mr. Minor's

attempt to win the right of suffrage for women under the Constitution was unsuccessful. It is in a way ironic that the end of the NWSA litigation strategy occurred in a case brought by Mrs. Minor and argued by her husband since they were the initiators of the 14th Amendment argument and Mr. Minor was the first to call for the making of a test case. After the Supreme Court's consistently negative stance, the women of the NWSA abandoned their reliance on a litigation strategy and again turned to the Congress in an attempt to gain passage of a Sixteenth Amendment to give the ballot to women. Their assessment of the Court's reluctance to apply the Fourteenth Amendment to sex discrimination was correct. It was not until 1971 that the Court finally did so in Reed v. Reed,[35] which ironically was the beginning of the third waive of a feminist litigation strategy.

II. The National Consumer's League (NCL)

The NCL was spawned in New York City in the early 1890's by a group of upper class women who had been appalled at the conditions of women workers in retail establishments. The latter frequently were forced to work long hours in darkly lit and poorly ventilated establishments. The founders of the NCL adopted a number of tactics to improve the conditions of working women. They were the pioneers of the "shop early" movement, an effort to induce the public to shop before the Christmas rush. They saw this as a way of improving conditions for young women who were often forced to work until the last customer left, with no additional pay for their increased hours. In 1899, after several organizations concerned with the working conditions of women and children had blossomed in Northeastern cities, the groups came together and incorporated as the National Consumer's League.[36] The NCL was always small in numbers. Yet the NCL was to have a great impact on the conditions of working women in the United States and the doctrine that it espoused before the Supreme Court has continuing vitality today.

Once the national headquarters was opened, the members believed that a competent executive needed to be selected in order to run the organization efficiently and give it greater direction. Florence Kelley was chosen to fill the position of General Secretary and for many years thereafter, her history was that of the NCL.[37] A farsighted woman, Mrs. Kelley had long been interested in labor conditions. Her senior honors thesis at Cornell dealt with the conditions of child labor. Before accepting her position with the NCL she had previously lived with Jane Addams at Hull House in Chicago for seven years. There she became involved in work that later had great impact on the direction of the NCL. In 1895 she made a statistical study of area "sweat shops" that subsequently was included in the volume Hull House Maps and Papers. In 1889 she directed an investigation of the square mile area around Hull House at the request of the U.S. Commissioner of Commerce and Labor. The study documented the squalid living conditions of the immigrants of eighteen nations who lived around Hull House. Public reaction to the study forced the Illinois State Legislature to initiate an immediate investigation of the need for legislative regulation of factory conditions. Illinois' first factory law was the outgrowth of the committee's work.

Florence Kelley was soon appointed Chief Inspector of Factories

and was therefore responsible for implementation of the act. Her attempts to have local District Attorneys enforce provisions of the newly adopted legislation were met with resistance and she found herself frustrated in her new job. As a result of these experiences, she enrolled at Northwestern University Law School and completed her law degree while working full time. Mrs. Kelley never actually practiced law but her education led her to appreciate the utility of strategically selecting cases to litigate. It is undoubtable that her legal education was instrumental in the policy she was to urge upon the NCL for preserving its legislative gains - make strategic use of the courts!

In their campaign to improve the conditions of women workers, the NCL eventually developed a two pronged method of action. Through strong local affiliates the NCL worked for the passage of maximum hour and minimum wage laws. Once enacted the NCL then relied on those affiliates to keep the national organization abreast of local challenges by employers and manufacturers to the constitutionality of that legislation.[38] Its usage of a litigation strategy was far more successful than that of the NWSA. The distinguishing features of the NCL and NWSA deserve momentary note. The NCL was able to obtain desired legislation in several states but subsequently was confronted with attacks upon the constitutionality of such legislation involving maximum hours and minimum wages for women. Therefore, unlike the NWSA, the NCL developed a defensive litigation strategy designed to maintain the legislation it had won. The organization did not go to the courts as the NWSA had because it was unsuccessful in the legislative forum. Perhaps, on balance, the use of the courts defensively is simpler than attempts to secure affirmative policy changes.

Florence Kelley, as noted, had early in her career learned the utility of a properly conceived litigation strategy. In her position as General Secretary of the NCL she was a consistent advocate in the use of the courts. It was, however, an experience in 1905 that crystallized her resolve. By that year, only four states had legislation prohibiting the employment of women on the night shift. In New York, where such a statute was in effect, an employer was arrested for scheduling a female to work after ten o'clock in the evening. The law was invalidated by the trial judge who cited an earlier Illinois case that had found the type of legislation in issue inconstitutional.[39] The trial court's ruling was affirmed by the Appellate Division. Mrs. Kelley and Josephine Goldmark, the Publications Secretary of the NCL, went to court that day to hear the argument and show the judge that the public was interested in the outcome of the case. To Mrs. Kelley's horror, no representative of the Attorney Generals office was present to orally argue the brief that the state had submitted in support of the constitutionality of the provision in issue.[40] According to Mrs. Kelley, the brief "was a disgraceful exhibition of ignorance,"[41] and the case was lost at that level as well as in the New York State Court of Appeals. It was that case that solidified in her mind the necessity of a litigation strategy and the form the strategy should assume. Otherwise, the NCL would see its lobbying efforts eroded by the courts. According to Miss Goldmark, after the trial Mrs. Kelley resolved:

> Never again would we be caught napping. Never again would we leave the defense of a labor law to an indifferent third assistant attorney general. Somehow we would see that a

> better lawyer handled the case, one who believed in the law and was better prepared to show the court why it was needed to protect women's health. Next time would be different![42]

Her resolve was soon put into action. In 1907 news came to the League's national office from its affiliate in Portland that a challenge to Oregon's ten hour maximum hour law for women was unsuccessful in the state court but would soon be heard by the U.S. Supreme Court.[43] Mrs. Kelley sought the services of Louis Brandeis, a well known Harvard professor and brother-in law of League Publications Secretary, Josephine Goldmark. Mrs. Kelley knew him to have a strong commitment to the idea of maximum hour legislation for women and other social reforms.

Brandeis consented to take the case on the stipulation that permission from the state of Oregon be obtained for himself and the League. In effect, the NCL through its Counsel, Prof. Brandeis, was to become the representatives of the state.* Permission was immediately granted and he, with the assistance of Josephine Goldmark and Florence Kelley began to collect vital information for their brief. This case marked the beginning of the NCL's use of the litigation strategy decided upon by Mrs. Kelley two years earlier. In all cases that the NCL was involved, it became a silent party to the case. Mr. Brandeis and later Felix Frankfurter argued the case for the state and the NCL's affiliation with the case never appeared on the brief.

The anonymity of the NCL is in sharp contrast to the practices of women's groups today. The sponsoring organization or organizations are always listed, even where the group has played a limited part in the preparation of the brief.

The brief submitted on behalf of the state of Oregon by the NCL remains famous today as the "Brandeis brief." It embodied "the presentation of economic, scientific and social facts,"[44] items commonly included in briefs today. In its time however, the Brandeis Brief was revolutionary and its submission somewhat risky since the reaction of the justices to its contents and presentation was unknown. For the month before the brief was due, Mrs. Kelley and Miss Goldmark scoured the libraries of Bostor and New York in search of data on the effects on long hours of labor on women's physical health. Little data of this sort had been collected in the United States and therefore they were compelled to rely heavily on materials from Europe, where concern over labor conditions was then much greater at that time. The brief in Muller v. Oregon when completed was 113 pages long. Only three of those pages were devoted to legal argument. The remaining 110 pages were filled with statistical data documenting the detrimental effect of long hours of labor on women. The brief met with success in the Supreme Court and copies of it (like the St. Louis Resolutions) were printed and sent to

*Throughout his career with the NCL, Brandeis insisted on acting as counsel for the states with their permission or at their specific request. He was not a strong believer in the effectiveness of the amicus brief in terms of the NCL's litigation strategy.

law schools and libraries around the country. On October 24, 1908, the Court ruled that maximum hour legislation for women was constitutional and the NCL's litigation strategy was launched on a successful footing.

Once the litigation strategy had been launched, it followed what became a fairly standard pattern. When the national office was notified that a challenge was being made to maximum hour or minimum wage type legislation for women, Mrs. Kelley sought the permission from the particular state's Attorney General to allow the NCL to direct the defense of the statute in question. In most instances these requests were granted. In New York the Attorney General on two occasions rejected the offers of the NCL to prepare the case; the AG did however submit a brief model after the type submitted by Brandeis in Muller.[45]

After prevailing in Muller, the NCL did not remain idle. Brandeis cautioned the officers that it was likely that other challenges to protective legislation provisions of other states were likely to follow. The NCL therefore sought and received a Russell Sage Foundation grant in order to undertake an extended study of the literature dealing with the conditions of female workers. An additional grant from the same foundation also allowed Miss Goldmark to write Fatigue and Efficiency. It was an exhaustive study of the effects of long hours of labor on women's health, and served as the basis of several later briefs the NCL submitted concerning the constitutionality of Maximum hour laws for women.

According to Clement Vose, the NCL also raised sufficient funds to prepare and distribute copies of the brief the group had submitted in Ritchie v. Wayman, a new challenge to Illinois' maximum hour provision for women workers. Louis Brandeis and Josephine Goldmark prepared a Muller type for Illinois, and the case was successfully argued by Brandeis overturning earlier negative precedent.

Until 1923, the League waged a vigorous fight to insure the constitutionality of state maximum hour and minimum wage laws for women. (See Appendix B) Between 1912 and 1914, the League was called on by several states to conduct the defense of maximum hour and minimum wage laws. The preparation of these briefs was again the work product of Josephine Goldmark with the cases being argued by Louis Brandeis. In 1916, Brandeis was appointed to the Supreme Court before the Court's decisions in the minimum wage cases (he had argued) were handed down. Felix Frankfurter replaced Brandeis as counsel for the NCL and appeared before the Court for the state of Oregon to argue Oregon's position on the constitutionality of minimum wage laws for women when reargument was requested by the Court. Frankfurter's first attempt for the NCL was less than successful. The Court, with Brandeis abstaining, split four to four on the constitutionality of minimum wages for women creating no favorable precedent for the NCL to later rely on.

According to Goldmark, between the Court's decision in 1917 and 1923, four state supreme courts upheld minimum wage laws for women. The next test of the constitutionality of minimum wage laws was not however, from a state court, but from the District of Columbia. And

in this case, the NCL was confronted with two astitute lawyers who used the "Brandeis Brief" to their own advantage and the League's detriment.[46]

In Adkins v. Children's Hospital, the NCL now represented by Felix Frankfurter and Mary Dewson (Miss Goldmark having resigned in 1923), prepared a 453 page brief in support of the District's legislation. The NCL here however, was not able to completely control the litigation as they normally did. Instead they were greatly hampered here by the participation of an inept city attorney. Unlike Muller where Brandeis had been allotted all of Oregon's time for oral argument, here the NCL shared time with the District's attorney. For the first time, in Adkins, the NCL suffered a serious setback when the Judges found the minimum wage hour provision unconstitutional. Justice Southerland writing for the majority remarked:

> "We have been furnished with a large number of printed opinions approving the policy of the maximum wage, and our own reading (as well as brief of the NCL's adversaries) has disclosed a large number to the contrary. These are all proper enough for the consideration of law making bodies... but they reflect no legitimate light upon the question of (the law's) validity."[47]

Kelley and the NCL did not abandon the courts after the decision. In her yearly report she noted, "Decisions (of the Court) also change with time, although not without long and sustained effort."[48] The League soon after was called on to defend the California minimum wage law and again a brief was prepared by the Dewson - Frankfurter team to document how minimum wage laws were beneficial to women. Unfortunately for the NCL the case proved to be defective and was never decided in the courts at all. After the Supreme Court again rejected the constitutionality of an Arizona minimum wage law in 1925, (a law that so poorly written that the League attempted to have it kept out of the courts), according to Goldmark it was the organization's belief that no good purpose would be served by bringing any other minimum wage law before the Court."[49]

Until 1933, the Consumer's League then followed a concerted effort to maintain a "non-litigation" strategy. Leaders of the group during this period actively tried to discourage litigation concerning the constitutionality of minimum wage laws, fearing that the few laws remaining in other states would be invalidated. In 1933, a new effort was launched in the courts and the NCL "persuaded other states to delay action and succeeded in having appealed to Washington a case involving the new minimum wage law of New York"[50] that had been drafted by Frankfurter to comply with the Adkins decision.

The New York decision was defended by the State's Attorney General who refused to allow the NCL to join in the defense.[51] The League, instead was represented by Dean Acheson who filed an amicus on behalf of several states who had minimum wage laws. Again the League was unsuccessful. And, again, Brandeis' belief that amicus briefs were unsuited for the purposes of the NCL's litigation strategy were proven correct.

The NCL's need for a litigation strategy was ended the year after their defeat in the Tipaldo case. Ironically they were not a party to the suit in any manner. In 1937, in West Coast Hotel v. Parrish,52 the Supreme Court finally upheld the constitutionality of minimum wage laws for women and brought about the end of an era of constitutional litigation for the League.

III. The American Civil Liberties Union Women's Rights Project and the National Organization for Women Legal Defense and Education Fund

Dissension and cleavage have characterized the women's groups that have attempted to pursue a litigation strategy since 1966. NOW, a major feminist organization with a large nationwide membership, was one of the first modern women's groups to move toward the adoption of a litigation strategy. Beginning in 1966, at the time NOW was founded, some of the members within the new organization undertook to form a separate tax exempt, nonprofit legal corporation to systematically handle sex discrimination cases. This suggested that some members recognized the potential utility of a litigation strategy in combating sex discrimination.

From its inception, NOW's legal arm experienced difficulties. Funding for it presented a major organizational problem. At first, NOW was forced to rely upon volunteer attorneys to staff its Washington headquarters. This sharply contrasted with the practices of the NAACP's Legal Defense and Education Fund upon which the NOW legal arm was modeled. The NAACP had a functioning law office comprised of salaried attorneys who relied upon volunteers for some assistance but directed much of the litigation. The absence of salaried legal staff damaged the NOW effort in its formative years. Several organizational and internal problems developed at the D.C. office. One consequence was that the attorneys who had been handling two major sex discrimination suits for NOW left the organization and took the clients and cases with them. Following what appears to have become somewhat of a "tradition" in the women's movement, these lawyers established their own non-profit, tax exempt corporation, Human Rights for Women (HRW).

HRW remains today a small, Washington, D.C. based group. Sylvia Ellsion, one of the two attorneys who originally left NOW, became HRW's General Counsel and most of its volunteers were former NOW members. HRW, at least initially, was not interested in litigation exclusively. In 1970 it called for a National Conference on Feminism to "clarify, discuss, and exchange views on the major issues in the women's movement today."53 Their proposal met with little enthusiasm, however, and plans for comprehensive multi-form political action were abandoned

Despite HRW's ultimately narrow focus; litigation, the organization quickly had a major impact in the courts. This came in the area of Title VII sex discrimination litigation which had been the initial target of NOW's legal strategy. Ellision, acting as General Counsel for HRW won both major suits she had brought with her from NOW.54 HRW's successes in the lower federal courts provided momentum for the arguments of women when the next major employment discrimination case under Title VII reached the Supreme Court.

Neither NOW or HRW was sponsored Phillips v. Marietta, the case to first bring Title VII to the Supreme Court. HRW did however, submit an amicus brief in support of the plaintiffs claim as did the ACLU, who was represented by Dorothy Kenyon, a former NCL member. In Phillips, HRW had the incentive and experience to act as amicus because of the precedent it had earlier established in the lower federal courts. The position advocated by HRW in earlier cases was sustained when the Supreme Court ruled that the differential treatment of male and female employees with children violated Title VII.

Phillips was the end of HRW activity of the level of the Supreme Court. NOW however, was only beginning to become involved in litigation. After several delays, NOW's legal arm was fully chartered in 1971. It did not actually become operative until 1973 when an office was opened in New York City with one volunteer staff member. Only recently did NOW employ its first full time staff attorney. Previously, requests from women about sex discrimination were referred to attorneys that the group knew to be interested in problems of sex discrimination. Although NOW had started out with a litigation strategy focusing upon employment discrimination under the Civil Rights Act of 1964, when Sylvia Ellsion and other D.C. volunteers left, NOW's strategy floundered for several years. During that period NOW lost valuable organizational time while at the same time other groups were forming to handle sex discrimination complaints through litigation. NOW's lack of a litigation strategy has also contributed to some of the difficulties it has encountered in seeking foundation support that other women's groups have been the recipients of. Their more radical image may also be part of the problem. As a result, they have had to depend largely on private individual donations for its support.

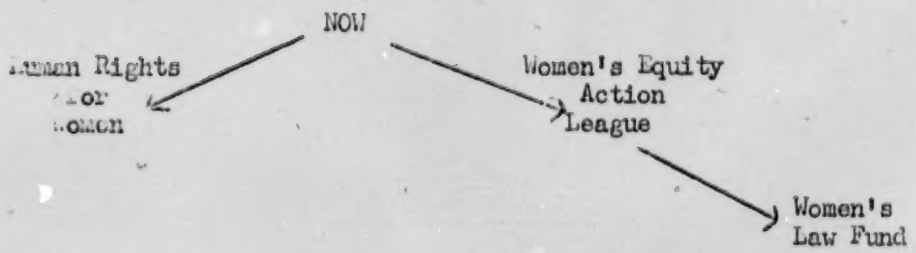
In one of its most popular appeals for funds, NOW highlights its use of the courts and in particular takes credit of bringing an end to sex-segregated help wanted ads through favorable judicial decision. The Women's Equity Action League (WEAL) also takes credit for this major policy victory.

WEAL was founded in 1968 after several of the delegates to NOW's annual convention were disturbed by its pro-abortion stand and convention tactics. Most of the women who broke away to form WEAL were older and politically more conservative than NOW members. In many respects the division was a conservative - liberal split modeled after the NWSA - AWSA schism that occurred almost one hundred years earlier. Elizabeth Boyer, who had been an active NOW member and founder of the Ohio delegation was the moving force behind WEAL. Initially most of WEAL's members came from the Cleveland area. There is a certain irony to the fact that WEAL was based initially in Cleveland, where the conservative AWSA held its first convention.

According to several WEAL members, it was they and not NOW that began the movement to end sex segregated help wanted ads in newspapers. Both NOW and WEAL were active in the EEOC's promulgation of Guidelines concerning help wanted advertising. Even if WEAL was the catalyst in bringing public attention to the problem, NOW was the first group to resort to the courts to see the discriminatory practice ended.

After the Commonwealth of Pennsylvania and the Pittsburgh Commission on Human Relations adopted an ordinance prohibiting sex-segregated help wanted ads, NOW filed a complaint with the Commission when Pittsburgh Press failed to terminate these ads in its columns. The Pittsburgh Commission on Human Relations ordered the newspaper to remove all sex labelling from the help wanted section but the newspaper refused to comply. Although the complaint was originally filed by the local NOW chapter, lawyers from the Commission, which is represented by the City Law Department, handled the litigation in the state courts. NOW lawyers did not participate in the case until it reached the Supreme Court level. When Pittsburgh Press decided to appeal the adverse decision against them to the high Court, the City decided that a women's organization "should share the burden of the case with a feminist organization."[55] It was generally believed that the presence of a women's organization would give greater prominence to the sex discrimination aspect of the case since competing First Amendment rights were also involved. Marjorie Matson was contacted by NOW's General Counsel, Sylvia Roberts and she consented to represent NOW before the Court. Ms. Matson, a local NOW member, and former president of the local ACLU chapter, collaborated with Eugene Strassburger III of the City Law Department on the brief submitted in an effort to sharpen the feminist issues for the Court.

Although WEAL was not the group requested to assist the City, they did submit an amicus brief in Pittsburgh Press. Somewhat reminiscent of the NCL's strategy the attorney's who submitted the brief were not identified as WEAL members. An amicus brief was also filed by the Women's Law Fund, interestingly enough, a splinter group from WEAL. Structurally, the splintering can best be illustrated:



In 1972 a split developed within WEAL. During a fund raising drive to create a separate "women's law fund," several members of the WEAL Board of Directors left WEAL in a disagreement over policy. The splinter group soon incorporated as the Women's Law Fund (WLF), in Cleveland. The splitting off of the WLF group was a severe blow to WEAL financially and organizationally. Previously promised Ford Foundation support never materialized. Instead of WEAL, the WLF received financial support from that Foundation. In many regards it seems as though WEAL never recovered from this break in their ranks. The full scale litigation strategy that had been planned was abandoned.

WEAL, like NOW its parent organization, has been forced to rely on attorneys around the country who have been willing to handle sex discrimination cases without pay. Without any full time staff attorneys, WEAL nevertheless has managed to pursue combined strategy of lobbying and litigation designed to bring about an end to sex discrimination in higher education.

Since 1970, WEAL and its members have filed hundreds of complaints against colleges and universities that receive federal funds. When action was not forthcoming on those complaints, WEAL initiated suit against HEW for not implementing its own guidelines regarding sex discrimination.

By concentrating in the higher education area in terms of litigation, WEAL has chosen a difficult task. Sylvia Roberts, NOW's General Counsel, has referred to higher education discrimination cases as the most difficult.[56] They involve extensive discovery, motion practice and often lengthy evidentiary trials. They are extremely costly. Ms. Roberts has for several years been handling a sex discrimination case against the University of Pittsburgh.[57] Some of the costs have been met through fund raising efforts by the Legal Defense and Education Fund. As General Counsel for NOW, Ms. Roberts sent a fund raising request to NOW members describing the litigation in the Pittsburgh case. Lawyers for the University of Pittsburgh brought professional misconduct charges against Ms. Roberts based on that letter, charging her with advertising and solicitation.[58] These charges have not yet been resolved.

This problem illustrates a larger one that face women's organizations that cannot afford regular staff attorneys. NOW and WEAL have relied heavily on women attorneys who find cases they are interested in and then contact a particular group for financial support. Much of this must be done confidentially because the highly paid defense counsel may adopt the counter strategy of trying to turn the case into one of professional ethics thus ignoring the fundamental issue of sex discrimination. Most women's groups, particularly the WLF, have concentrated their litigation activities in areas simpler than higher education. Cases like Reed[59] and Frontiero[60] involved simpler problems of proof because they focused upon statutes that were discriminatory on their face. The more subtle forms of discrimination that take place in academia become "complex litigation" and require substantial expertise and time at all stages of the action. Plaintiffs must build their case through a complicated process of discovery and motion practice before even "getting into court." And once in the courtroom, the trial itself is likely to be complex and lengthy.

NOW's support of the Sharon Johnson case is illustrative of a comment Jo Freeman has made in discussing women's group use of the courts.

> The women's movement has only recently created the machinery to systematically assault the legal channels as the NAACP Legal Defense and Education Fund did, but has yet not plotted the strategy for so doing...However, most cases have been handled sporadically by dedicated lawyers who donated their time out of commitment to the issue.[61]

Her assertion is a fair assessment of NOW, and to a lessor extent WEAL's litigation efforts. Her description however, is not applicable to litigation efforts of the WRP. The WRP has among women's groups become somewhat unique. Although it has at times experienced problems in monitoring the flow of cases to the Supreme Court, the WRP has been the only women's organization able to pursue a systematic litigation strategy. Since its creation in 1973 as a separate legal arm of the ACLU, the WRP has handled more sex discrimination cases than all other women's organizations combined.

Its activities have not been limited to litigation. The WRP has spent much of its time trying to improve methods of communication between women's groups that attempt to use a litigation strategy. The WRP currently is in the process of collecting the legal dockets of all feminist groups in an effort to systematize nationwide litigation. Responses from other women's groups have been slow. At this time only two organizations have responded to its requests.

The WRP has also attempted to build up local affiliates to manage sex discrimination cases when they first emerge. However as other organizations found, there are an insufficient number of women attorneys interested in handling non-renumerative sex discrimination litigation to enable successful implementation of such a tactic. The WRP had attributed its inability to implement fully the local affiliate plan to a general preference of women attorneys to become involved with NOW.[62] Their assumption appears mistaken because NOW seems to have far greater difficulties than the WRP in its legal recruitment.

Through a partially developed network of affiliates, a full time staff of four attorneys and adequate support staff, the WRP is able to keep abreast of most significant litigation being initiated throughout the country. There have, however, been a few "costly" oversights in this system. For example, when a jurisdictional statement is filed before the Supreme Court in a non-WRP sponsored case, WRP office practice is to contact the attorney of record with an offer of assistance and support if the case appears to be one that could have a potential impact of the WRP's legal strategy. Recently, assistance was offered to appellant's in Kahn v. Shevin,[63] where Florida's tax exemption for widows but not widowers was being challenged.

The staff of the WRP were distressed when Kahn reached the Supreme Court level because it upset their legal strategy. They had been attempting to have sex declared a suspect classification by bringing a series of military sex discrimination cases. After Frontiero, they

had hoped that Weinberger v. Weisenfeld would be the next case decided by the Court in what the WRP saw as a logical progression similar to the strategy employed by the NAACP. To add insult to injury the WRP was astounded to learn when they offered assistance that Kahn was an ACLU case from the beginning!

Both the ACLU and the WRP attempt to monitor their cases at the Supreme Court level by requiring local affiliates to file their jurisdictional statement with the national office before it is submitted to the Supreme Court. Through some "mix up," this was never done in Kahn. Even though the WRP filed a joint brief with the appellants, and Ruth Bader Ginsberg argued the case before the Supreme Court, the Court ruled that special treatment of widows by the State was reasonable citing ironically, Muller v. Oregon, the case that began the NCL's use of a litigation strategy several years earlier.

Requests for assistance have sometimes resulted in strategy disputes between the WRP and the original attorney. In a recent case, Vorchheimer v. School District of Philadelphia, assistance was requested by local trial counsel from the WRP but later rejected. After the first brief was submitted to the Court, strategy and personal disagreements led to the withdrawal of the WRP from the case. As a result, they were not a party to the reply brief and so notified the Court of their withdrawal.

Unlike many of the other women's groups, the WRP's role has not been limited at the Supreme Court level to the filing of amicus briefs. After the first major sex discrimination case was won under the Fourteenth Amendment in 1971, the WRP was involved with several military discrimination cases. It was the sponsor of the first pregnancy case that reached the Supreme Court.[65] A female member of the armed forces had been dismissed solely because she was pregnant. When Dean Griswold who was then the U.S. Solicitor General saw the WRP's brief, he admitted that they were right. As a result, in order for the United States to avoid an adverse ruling from the Court (part of their own litigation strategy), the woman was reinstated and the issue became moot.

The WRP has also been active in the jury discrimination sphere. It was counsel for the appellees in Edwards v. Healy,[66] the companion case of Taylor v. Louisiana.[67] Both cases were successful challenges to the constitutionality of compulsory registration jury provisions for women. The argument put forth by the WRP was greatly aided by two amicus briefs submitted on behalf of the American Bar Association supporting their position. According to a WRP attorney, "if you're trying to impress the Court the ABA is very helpful. It proves that your advocating nothing too radical." In keeping with the tenor of ABA briefs, the brief submitted by the WRP was very low key. However, if did want a stronger brief of the issues to be submitted also. Therefore the women attorneys at the Center for Constitutional Rights were encouraged to file a brief making the point that any women's exemption was unacceptable, even if it was only for child care. It was the belief of the WRP that the more militant brief should come from an amicus rather than the Project, so as not to antagonize the Justices.

Like most other women's rights organizations, the WRP receives more requests for legal assistance than it can handle. As a result, criteria have been developed to assist the group in its decisions about what cases

to handle. Factors considered include:

1. Whether the issue is novel and of national importance for poor, minority, working or older women.
2. Whether the apparent sex discrimination seems provable.
3. Whether a victory is likely if the case is well handled.
4. Whether the issue is the next logical step in the development of the law.
5. Whether a loss would be so damaging to the development of the law that it is not worth the risk.
6. Whether large number of women will benefit, directly or indirectly, fromthe decision.
7. Whether the client could find a lawyer to represent her if we don't take the case.[68]

Numbers four and five are particularly illustrative of the WRP's overall concern with pursuing a litigation strategy. If the issue is not the next logical step in the development of the law, "rushing" the issue may contribute bad "precedent." The WRP is particularly sensitive to this problem because of the Supreme Court's present composition.[69]

Given the current attitude of the Supreme Court and its recent series of negative decisions concerning women's rights issues, particularly abortion, the WRP is now being extra careful in selecting the cases it becomes involved with. Since it and the other women's groups involved in litigation are relatively new and interest group litigation normally must be continued over a number of years, it is difficult at this time to make an accurate estimation of their success or failure. All the groups involved, however, have made meaningful inroads to alleviating sex discrimination.

Conclusion

This paper has attempted to present a preliminary overview of women's interest group activity in the courts. Several generalizations about that activity can be drawn. Most women's groups begin their activity by pursuing legislation designed to secure a substantive right for women. The NWSA initially sought a voting amendment, the NCL protective legislation, and among modern women's groups, employment discrimination and abortion legislation have tended to be their preliminary goals. Depending upon the outcome of their efforts to secure legislative relief, women's groups have faced one of two alternatives. If they were unsuccessful in obtaining their objectives through legislation, they turned to the courts as did the NWSA. If however, they secured favorable legislation, women's groups often must contend with another type of problem.

When the law is implemented, other groups who seek to maintain the status quo, may challenge the constitutionality of the law. Women's groups such as the NCL, frequently must defend the legislation or see their efforts wasted. In other instances, even if the legislation sought is obtained, the problem of "non-implementation" may emerge. That is, those designated to enforce the law fail to do so or do so inadequately. Non-implementation has plagued much of the recent women's

rights legislation, and women's groups frequently have been forced to resort to the courts to see effective implementation. The Pittsburgh Press case, where a publisher refused to follow obey the anti-discrimination provisions a local ordinance, was brought only after a NOW initiated action to see the law implemented.

Thus far the only women's group that has been entirely successful in obtaining its goals by means of a litigation strategy has been the NCL. Unlike the other groups herein discussed, it pursued a litigation strategy for almost thirty years. The NWSA abandoned its strategy after only six years and the current women's groups have only been actively pursuing litigation strategies since 1973. Among current women's groups, it is possible that the WRP will enjoy the longevity of the NCL because, they too have been able to attract financial support from key foundations. Most other women's groups have not.

Foundation support appears particularly critical in aiding group success. Both the NCL and the WRP, although women's organizations, have had active male members. It is possible that women on their own, given their status in society are at a severe disadvantage in obtaining foundation support. The lack of this support appears to have been particularly problematic for women because they frequently have been unable to raise the large sums of money necessary to sustain any type of meaningful litigation effort. Among current women's groups, it seems that many have almost resigned themselves to a lack of funding even though groups that are unfunded by foundations are almost universally unable to maintain the staff of "in-house" attorneys necessary to maintain a viable litigation strategy. One prominent NOW member has attributed her group's inability to obtain foundation support to the fact that members on the boards of most foundations see NOW as too radical a group and that a substantial number of foundation trustees have at one time or another been ACLU members. Another factor likely to have contributed heavily to NOW's difficulties in getting support is that there are no males in NOW who provide an "overlap" in membership with foundation trustees. It would appear in some ways ironic that the WRP is the beneficiary of the "old buddy" network and receives the recipient of sizeable foundation support because male ACLU members view it as an integral part of the ACLU, a male dominated organization!

Limited funds have also caused many women's groups to normally limit their participation to the role of amicus. The use of amicus curiae briefs in the 1800's was relatively uncommon and the NWSA did not employ their use. Louis Brandeis, counsel for the NCL refused to enter a case on behalf of the NCL if only an amicus was to be used. He believed that control of the litigation was crucial in order for the NCL's litigation strategy to be successful. The use of amicus briefs by several contemporary women's groups has expanded yearly. Given the current group of negative judicial decisions on the status of women, it is possible that many of these briefs are futile. There are exceptions to this general rule, however, but the WRP is the only group that has appeared to have had consistent Supreme Court recognition of their amicus briefs. For example, in a recent case that challenged Alabama's refusal to hire a woman prison guard (because she failed to meet minimum height and weight requirements), the ACLU filed an amicus brief urging the Court, if it was to decide that exclusion of women guards from Alabama's prisons

was reasonable (because of their notorious conditions), then the Court should construe the bona fide occupational qualification of Title VI narrowly. The Southern Poverty Law Center lawyers who handled the case were unhappy with the WRP brief; staff lawyers believed it weakened their case by giving the Court an "out." The Supreme Court's ruling vindicated the WRP's strategy, however, finding the discrimination against women in Alabama reasonable but the Court adopted language from the WRP brief and construed the exception narrowly. Therefore, at least in this case, the WRP amicus brief was a successful contribution to its litigation strategy and a fairly unique illustration of the potential usefulness of an amicus in terms of a litigation strategy.

This examination of women's group use of a litigation strategy has only highlighted some of that usage. Further research needs to be done in this previously ignored area.

FOOTNOTES

1. Books include, William O'Neill, THE WOMEN MOVEMENT (1969); Elizabeth Cady Stanton, EIGHTY YEARS AND MORE (1898); William H. Chafe, THE AMERICAN WOMAN (1972); Elizabeth Flexner, CENTURY OF STRUGGLE (1977); Lois Banner, WOMEN IN MODERN AMERICA (1974); Elizabeth Cady Stanton, Susan B. Anthony and Matilda Gage, (eds.)HISTORY OF WOMAN SUFFRAGE - Volumes I-VI (1970); Jo Freeman, THE POLITICS OF WOMEN'S LIBERATION (1975); Leo Kanowitz, WOMEN AND THE LAW (1976); Barbara Babcock, Ann Freedman, Eleanor Holmes Norton, and Susan C. Ross , SEX DISCRIMINATION AND THE LAW (1975); Kenneth Davidson, Ruth Bader Ginsberg and Herma Hill Kay, SEX BASED DISCRIMINATION (1973); Susan and Martin Tolchin, CLOUT (1974); and, Irene Murphy, PUBLIC POLICY ON THE STATUS OF WOMEN (1973).

2. June Sochen's HERSTORY fails to mention women's group use of the courts. Louise M. Young's, "Women's Place in American Politics: The Historical Perspective," 38 THE JOURNAL OF POLITICS (1976), devotes four paragraphs to a discussion of the use of litigation under the Fourteenth Amendment by women in the 1870's but fails to make the observation that they were part of a concerted strategy, notisolated instances.

Richard Cortner in THE SUPREME COURT AND CIVIL LIBERTIES POLICY (1975) devotes two chapters to women's rights litigation. Ruth Cowan also has a forthcoming article in the COLUMBIA INTERNATIONAL HUMAN RIGHTS JOURNAL describing the litigation in WEINBERGER V. WIESENFELD, a case sponsored by the Women's Rights Project of the American Civil Liberties Union, and part of that group's strategy to end sex discrimination in the military. Both of these author's limit themselves to discussion of a particular case or issue and the larger concerted nature of the litigation is ignored. Clement Vose's "The National Consumer's League and the Brandeis Brief," 1 MIDWEST JOURNAL OF POLITICAL SCIENCE (1957) does deal with the litigation strategy pursued by the League but fails to see it in terms of women's group use of the courts. This failure is possibly due to the fact that the efforts of the NCL are viewed by women's groups today as having produced terribly unfeminist results. At the time however, the NCL reflected the views of the majority of women in the United States.

3. Josephine Goldmark's IMPATIENT CRUSADER (1953) is the best available source on the life of Florence Kelley, the former Executive Secretary of the National Consumer's League.

4. 298 U.S. 587 (1936).

5. 368 U.S. 57 (1961).

6. 400 U.S. 542 (1971).

7. 334 U.S. 1 (1948).

8. Richard Kluger, SIMPLE JUSTICE (1975).

9. Richard Cortner, "Strategies and Tactics of Litigants in Constitutional Cases," 19 JOURNAL OF PUBLIC LAW (1967) p. 287.

10. Until the 1970's there has been no real exchange of experience or information among women lawyer's because they had no really effective national organization like Black attorneys had had for several years. In addition, until the current upsurge in women's admission to law schools nationally, women lawyer's frequently went through law school with only a handful or no other women to share their ideas about discrimination with. Unlike Blacks who if trained at Howard were exposed to the use of litigation to bring about an end to racial discrimination, most law professors during the 1960's scoffed at problems of sex discrimination. Women and the Law courses in law schools are a relatively new phenomena and as a result women's rights litigation has only recently experienced a litigation explosion.

11. For example, when a case involving sex segregated high schools in Philadelphia recently came before the Court, many experienced women attorneys were distressed. The trial record in the case was weak and several potentially damaging stipulations have been made. In many respects therefore, the Court was faced with making a Plessey v. Ferguson, "separate but equal" decision, something that women's groups had hoped to avoid or at minimum, come before the Court with a better "test case" of the issue.

12. General Electric Company v. Gilbert, 45 U.S. L.W. 4031, December 7. 1976.

13. Interview with Ruth Bader Ginsberg, June 14, 1977.

14. Brief Amici Curiae, of Women's Law Project and American Civil Liberties Union, General Electric Company v. Gilbert, p. 1.

15. Ibid., p. 2.

16. The IUE has an extremely large number of female members. It has been active for years trying to remedy discrimination.

17. Brief Amici Curiae of the American Civil Liberties Union, The Center for Constitutional Rights, the National Organization for Women Legal Defense and Education Fund, The Women's Law Project, The Center for Women Policy Studies, The Women's Legal Defense Fund, and, Equal Rights Advocates, Inc. in Coker v. Georgia, No. 75-5444.

18. Ibid., p.11.

19. The Center, although involved in a wide range of civil rights litigation, has been particularly involved in medicaid abortion litigation. It has a staff of three women attorneys who devote themselves almost full time to sex discrimination litigation and they frequently work in conjunction with, or give valuable legal assistance to, other women's rights groups.

20. Nathan Hakman, "Lobbying the Supreme Court: An Appraisal of Political Science Folklore," 35 FORDHAM LAW REVIEW (1966).

21. Letter of Francis Minor to THE REVOLUTION, October 14, 1869, published in THE REVOLUTION, October 21, 1869, p. 250.

22. Rheta Childe Dorr, SUSAN B. ANTHONY: THE WOMAN WHO CHANGED THE MIND OF A NATION (1928) pp. 226-7.

23. Minor letter, op. cit., p. 250.

24. HISTORY OF WOMAN SUFFRAGE, Vol. II p. 586.

25. For example in Francis Minor's letter to THE REVOLUTION he notes that if a test case were made, "in no other way could our cause be more widely, and at the same time definitely brought before the public. Every newspaper in the land would tell the story. . . The question would be thoroughly discussed by thousands, who now give it no thought - and by the time it reached the court of final resort, the popular verdict would be in accord with the judgement that is sure to be rendered."

26. WOMAN SUFFRAGE AND POLITICS (1923) p. 93.

27. 83 U.S. (16 Wall.) 130 (1873).

28. 6 Am. L. R. 1871-2.

29. 24 F. Cas. 829 (No. 14459) (N. D. N.Y. 1873).

30. 88 U.S. (21 Wall.) 166 (1875).

31. Miss Anthony's lawyer refused to allow her to remain in jail so he put up bail for her release. His action's robbed her of the right to bring a habeus corpus writ challenging her arrest.

32. Spencer v. Board of Inspectors, 6 Am. L. R. 1871-2.

33. Kathryn Anthony, SUSAN B. ANTHONY (1957) p. 279.

34. Ibid., p. 282.

35. 404 U.S. 71 (1971).

36. For a complete history of the NCL see Maude Nathan, THE HISTORY OF AN EPOCH-MAKING MOVEMENT (1926).

37. For fuller accounts of Mrs. Kelley's life and work see Maude Nathan, STORY OF AN EPOCH-MAKING MOVEMENT (1926); Goldmark, op.cit.; and "Florence Kelley," II NOTABLE AMERICAN WOMEN (1971) pp. 316-319.

38. The NCL also subscribed to a newspaper clipping service to keep them abreast of current litigation and legislation.

39. Ritchie v. People, 155 Ill. 98 (1895).

40. People v. Williams, 189 N.Y. 131 (1907).

41. Goldmark, op. cit., p. 148.

42. Ibid., pp. 149-150.

43. That case came to be known as Muller v. Oregon, 208 U.S. 412 (1908).

44. Goldmark, op.cit., p. 157.

45. Additionally, in the first case, People v. Charles Schweinler Press (1915) Brandeis submitted to the N.Y. Court a summary of "facts of knowledge" - 400 pages of data collected by Josephine Goldmark. An updated version of the "facts of knowledge" was later used by the N.Y. Attorney General to support his brief in Radice v. New York (1924).

46. For a fuller account of this case see Clement Vose, CONSTITUTIONAL CHANGE (1972) pp. 189-196.

47. Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525 (1923).

48. Goldmark, op. cit., p. 174.

49. Ibid., p. 175.

50. Ibid., p. 176.

51. Morehead v. Tipaldo, 298 U.S. 587 (1936).

52. 300 U.S. 379 (1937).

53. "Conference on Feminism Postponed," HRW memo dated June 9, 1970, HRW organization file, Schlesinger Library.

54. Those cases were Bowe v. Colgate-Palmolive Co., 416 F.2d 711 7th Cir. (1969. and Hendelkoch v. Industrial Welfare Commission and North American Aviation, Inc., 284 F. Supp. 950 (C.D. Cal. 1968), appeal dismissed, 393 U.S. 83 (1968).

55. Interview with Marjorie Matson, counsel for NOW, June 23, 1977.

56. Conversation with Sylvia Roberts, July, 15, 1977.

57. Sharon Johnson v. University of Pittsburgh.

58. Ms. Roberts is being represented by the WRP in this charge.

59. 404 U.S. 71 (1971). Reed involved a challenge to an Idaho statute that compelled preference for male administrators (of estates).

60. 411 U.S. 677 (1973). Frontiero involved a challenge to an automatic dependents allowance given male members of the military but not females. Females were required to prove that their spouse depended upon them for more than one half of their support.

61. Jo Freeman, The Politics of Women's Liberation (1975 (p.

62. WRP Memo to Affiliate Lawyers, Re: Second Women's Caucus at the ACLU Biennial, (WRP Memo), (updated) p. 3.

63. 416 U.S. 351 (1974).

64. 420 U.S. 636 (1975).

65. Struck v. Secretary of Defense, 461 F. 2d 1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgement vacated and remanded for mootness, 409 U.S. 1071 (1972).

66. 421 U.S. 772 (1975).

67. 419 U.S. 522 (1975).

68. WRP Memo, pp.1-2.

69. According to an attorney for one of the women's groups, all the groups are now reluctant to bring any cases without the benefit of favorable lower court decisions and even then, sex discrimination litigation is viewed as risky before the Court. In many respects there appears to now exist a situation similar to that between 1923 and 1933 when the NCL pursued a non-litigation strategy fearing adverse decisions from the high Court.

APPENDIX A

Whereas, In the adjustment of the question of suffrage now before the people of this country for settlement, it is of the highest importance that the organic law of the land should be so framed and construed as to work injustice to none, but secure as far as possible perfect political equality among all classes of citizens: and,

Whereas, All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside; be it

Resolved, 1. That the immunities and privileges of American citizenship, however defined, are national in character and paramount to all state authority.

2. That while the Constitution of the United States leaves the qualifications of electors to the several states, it nowhere gives them the right to deprive any citizen of the elective franchise which is possessed by any other citizen-to regulate, not including the right to prohibit the franchise.

3. That, as the Constitution of the United States expressly declares that no state shall make or enforce any laws that shall abridge the privileges or immunities of citizens of the United States," those provisions of the several state constitutions that exclude women from franchise on account of sex, are violative alike of the spirit and letter of the Federal Constitution.

4. That, as the subject of naturalization is expressly withheld from the states, and as the states clearly would have no right to deprive of the franchise naturalized citizens, among whom women are expressly included, still more clearly have they no right to deprive native-born women citizens of this right.

5. That justice and equity can only be attained by having the same laws for men and women alike.

6. That having full faith and confidence in the truth and justice of these principles, we will never cease to urge the claims of women to a participation in the affairs of government equal with men.

Appendix B

CASE	TYPE OF LEGISLATION AT STAKE	TYPE OF NCL INVOLVEMENT
1908 Muller v. Oregon	10 hr. maximum for women	brief & arg. in USSC - L.B. & J.G.
1909 Ritchie v. Wayman	54 hr. Ill. max.	brief & arg. in St. SC- L.B. & J.G.
1911 Ex parte Hawley	54 hr. Ohio max.	brief & arg. in St. & USSC - L.B. & J.G.
1912 Peo. v. Elderling	Ill. 10 hr. law in merchantile stores	brief for St. - J.G.
1912 Ex parte Miller (Miller v. Wilson)	Calif. 8hr/48hr/wk. max.	brief & arg. USSC - L.B. & J.G.
1914 Stettler v. O'Hara Simpson v. O'Hara	Ore. min. wage law for women	brief & arg. in St. & USSC - L.B. & J.G. re-argument USSC - F.F.
1914 Peo. v. Chas.Schwinter Press	N.Y. max. hr.	"Facts of knowledge" brief submitted to CA to supplement AG's brief L.B. & J.G.
1915 Riley v. Mass.	10 hr/56hr/wk. max	brief & arg. USSC - F.F. & M.D.
1915 Bosley v. McLaughlin	Cal. 8hr. max. for student nurses	brief & arg. St. & USSC L.B. & J.G.
1921 Children's Hospital v. Adkins (Adkins v. Children's Hosp.)	D.C. min. wage	brief & arg. D.C. C/A & USSC - F.F. & M.D.
1924 Gainer v. Dohrman	Calif. min. wage	St. court brief F.F.&M.D.
1924 Radice v. N.Y.	N.Y. 8hr. max.	A.G. used updated "Facts of Knowledge" brief
1936 Morehead v. Tipaldo	N.Y. min, wage	alc arg. & brief - D.A.

L.B. - Louis Brandeis
J.G. - Josephine Goldmark

F.F. - Felix Frankfurter
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